

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of U S West Communications, Inc.) CC Docket No. 98-157
for Forbearance from Regulation as a)
Dominant Carrier in the Phoenix, Arizona MSA)

OPPOSITION OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"),¹ by its attorneys, hereby opposes U S West Communications, Inc.'s ("U S West") petition for forbearance from regulation as a dominant carrier in the provision of high capacity services in the Phoenix, Arizona MSA.² Specifically, by its petition, U S West requests that the Commission forbear from enforcing Part 61 of its Rules to U S West as a dominant provider of high capacity services in the Phoenix, Arizona MSA, as well as any other rules affecting high capacity services which result in different regulatory treatment for dominant and non-dominant carriers.

As a preliminary matter, CompTel applauds the Commission's past and continuing efforts to promote competition in the local services market in the manner prescribed by the Telecommunications Act of 1996 ("1996 Act"). It is precisely because those efforts have

¹ CompTel is an industry association representing approximately 250 providers of competitive telecommunications services.

² *Pleading Cycle, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Rel. August 28, 1998.

not yet been successful, with the result that genuine competition in the local and access services markets has not yet materialized, that CompTel strongly urges the Commission to rebuke efforts by incumbent local exchange carriers, such as U S West, to circumvent regulatory requirements necessary to curb anticompetitive behavior and to avoid obligations imposed on them by the 1996 Act. As explained below, U S West continues to dominate the facilities-based market segment for high capacity services in Phoenix. Thus, the statutory criteria for forbearance are not met in the existing market for high capacity services and the Commission must reject U S West's request for reclassification as a non-dominant carrier.

I. U S WEST DOES NOT JUSTIFY FORBEARANCE FROM DOMINANT CARRIER REGULATIONS FOR ITS HIGH CAPACITY SERVICES IN PHOENIX

Any request for forbearance must satisfy the three-prong test set forth in Sections 10(a) and (b) of the 1996 Act.³ A brief review of these requirements demonstrates that U S West has not made even a *prima facie* case for forbearance from application of Part 61 and other dominant carrier regulations. Pursuant to Section 10(a), the Commission may not grant U S West's forbearance request unless U S West demonstrates that:

- (1) enforcement of dominant carrier regulations is not necessary to ensure that U S West's charges and practices are just, reasonable and nondiscriminatory;
- (2) enforcement of dominant carrier regulations is not necessary to protect consumers; and
- (3) forbearance from enforcing dominant carrier requirements is consistent with the public interest.⁴

³ 47 U.S.C. §§ 160(a)-(b).

⁴ *Id.* at § 160(a)(1)-(3).

In addition, in determining whether forbearance is in the public interest under subsection (3), the Commission must consider whether forbearance will promote competitive market conditions and otherwise enhance competition among carriers in Phoenix.⁵

U S West has failed to demonstrate compliance with any of the required criteria. The petition itself shows that U S West maintains monopoly control over the facilities used to provide basic local services and high capacity services. As a result, U S West has both the incentive and the opportunity to engage in cross-subsidization and other discriminatory behavior to the detriment of competition and consumers. For those reasons, U S West has not satisfied the statutory criteria for forbearance and its petition must be rejected.

II. U S WEST STILL ENJOYS MARKET POWER IN THE PHOENIX HIGH CAPACITY MARKET

In order to grant U S West's request for forbearance from dominant carrier regulations, the Commission must find that U S West does not have market power over high capacity services in the Phoenix, Arizona MSA. Market power exists when a carrier has the ability to raise prices by restricting output of its services,⁶ or when a carrier has sufficient control over the underlying facilities to enable it to discriminate against competing retail providers.⁷

⁵ *Id.* at § 160(b).

⁶ *See Cable & Wireless, Inc.; Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide Resold and Facilities-Based Switched and Private Line Services between the United States and Russia and to Be Held Non-Dominant for All Services on This Route*, 1998 FCC Lexis 1561, ¶ 6 (April 2, 1998).

⁷ *See ntt.com, inc.; Application for Authority under Section 214 of the Communications Act of 1934, as Amended, to Resell Non-Interconnected Private Line Services between the United States and Japan*, 1998 Lexis 313 at ¶ 6 (January 26, 1998). In addition to market share, the Commission's market power analysis focuses on: (1) supply elasticity of the market; (2) demand elasticity of the customers; and (3) the carrier's cost structure, size and resources.

When a carrier has market power, particularly when it has a high market share and controls bottleneck facilities, the Commission has consistently imposed dominant carrier regulations.

Although several facilities-based and resale carriers have entered the Phoenix market in recent years, U S West, by its own admission, still controls approximately 77% of the facilities-based high capacity market segment.⁸ In the past, the Commission has reclassified carriers as non-dominant only in limited circumstances. In no instance has the Commission found a carrier to lack market power where it has a facilities-based market share as high as 77%, especially where, as in the case of U S West, the carrier controls bottleneck facilities. In one previous case involving high-capacity services, the Commission found a carrier with a lesser market share to be a dominant carrier. In that case, the Commission classified a foreign-affiliated U.S. carrier as dominant based upon the Commission's view that its foreign parent possessed market power over international private lines ("IPLs"). Even though the foreign parent did not control bottleneck local exchange facilities, the Commission found the parent to have market power due in part to its estimated 75% share of the IPL market based on revenue (60% when measured by capacity), which the Commission found to be "relatively high."⁹ Here, where U S West controls 77% of the facilities-based high capacity market in conjunction with its control over bottleneck local exchange facilities in Phoenix, there is no reasonable basis for reclassifying U S West as a non-dominant carrier in that market segment.

Ironically, U S West relies on the Commission's reclassification of AT&T as a non-dominant carrier to support its claim for non-dominant status. However, in granting

⁸ See *U S West Petition* at 22.

⁹ *KDD America, Inc.; Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Resell Non-Interconnected Private Line Services between the United States and Various International Points*, 11 FCC Rcd 11329, ¶12 (1996).

AT&T's request for non-dominant status in the domestic interexchange market, the Commission expressly relied upon the fact that AT&T no longer controlled bottleneck local exchange facilities.¹⁰ In particular, the Commission focused on the fact that "AT&T ha[d] not controlled local bottleneck facilities for over ten years."¹¹ Of course, U S West's request is different because it continues to control bottleneck local exchange facilities while maintaining a dominant market share over facilities-based high capacity services. Thus, rather than support U S West's petition, the decision to reclassify AT&T as non-dominant illustrates the Commission's reluctance to classify carriers that control bottleneck facilities as non-dominant.

Perhaps recognizing this fatal flaw in its petition, U S West argues that its dominance of high capacity facilities in Phoenix does not constitute market power because it allegedly controls only 30% of the retail high capacity market. CompTel submits that U S West's rationale is misleading. The fact remains that U S West maintains monopoly control over facilities used to provide high capacity services. Control of high-capacity facilities, not retail market share, is the most telling indicator of market power, particularly given U S West's continuing control over the broader local exchange bottleneck in Phoenix. Indeed, if U S West is correct that the high capacity market segment in Phoenix is characterized by high demand elasticity, then it could easily increase its retail market share significantly in a relatively short space of time through relatively modest retail pricing and marketing adjustments.¹² The Commission should not rely primarily upon market share data that are admittedly subject to such volatility when assessing an incumbent LEC's market power. So long as U S West has market

¹⁰ See *In the Matter of Motion of AT&T to Be Reclassified as A Non-Dominant Carrier*, 11 FCC Rcd 3271, 3308 (1995).

¹¹ *Id.*

¹² See *id.* at 25.

power over high capacity facilities in Phoenix, it would be premature to reclassify U S West as a non-dominant carrier for high capacity services.

III. THE POTENTIAL FOR MARKET EXPANSION IN THE PHOENIX MSA IS YET ANOTHER EXAMPLE OF U S WEST'S MARKET POWER

U S West concedes that, from a geographic perspective, a significant portion of its high capacity network in Phoenix is not yet subject to competition from competitive local exchange carriers ("CLECs").¹³ Yet, U S West is seeking deregulation today for the entire Phoenix MSA, not just those areas where it faces competition from alternative networks. Plainly, U S West's current 77% market share indicates that the CLECs' facilities-based inroads into U S West's monopoly over high capacity transmissions are still in their infancy. Thus, a request for non-dominant treatment is not only premature at this time, it is overbroad in light of the insignificant geographic penetration captured by competitive LECs in Phoenix. The Commission must deny U S West's request for non-dominant status until the Phoenix high capacity market is fully competitive.

U S West claims that competitors in the Phoenix market can easily acquire or build additional facilities in a relatively short period.¹⁴ However, U S West's arguments about how quickly CLECs could expand in the Phoenix market are mere speculation. The incumbent LECs have been making similar arguments about CLEC expansion since the mid-1980s when they were trying to escape the line-of business restrictions in the AT&T consent decree. The truth is that U S West does not have sufficient information to forecast accurately the feasibility,

¹³ See *id.* at 13, 27.

¹⁴ *Id.* at 30.

cost or timing of the CLECs' build-out of alternative networks in Phoenix. There are many factors that affect network expansion which are beyond U S West's ability to predict or control.¹⁵

Rather than credit U S West's self-interested predictions of imminent facilities-based competition, the Commission should adopt a "show-me" approach and deny U S West's petition until it can show actual (as opposed to theoretical) facilities-based competition in the Phoenix, Arizona MSA to justify reclassification as a non-dominant carrier. Indeed, the premature deregulation of U S West in Phoenix could provide a disincentive for CLECs to build-out their high capacity networks in the MSA. Simply put, if U S West is willing and able to charge below-cost rates for deregulated high capacity services, the CLECs currently operating in Phoenix may be reluctant to invest scarce capital in the Phoenix market because they can obtain better returns by investing that capital in other markets where expansion is needed just as urgently. As a result, Phoenix customers will be less likely to benefit from the selection of carriers and lower prices that arise from competition if the Commission grants U S West's request for forbearance.

IV. NON-DOMINANT STATUS WOULD ENABLE U S WEST TO CROSS-SUBSIDIZE HIGH CAPACITY SERVICES

A. U S West Would Engage In Harmful Cross-Subsidies

U S West completely ignores the issue of cross-subsidization except to place the potential for such behavior on its non-dominant competitors.¹⁶ Despite U S West's unwillingness to address cross-subsidization, it is a serious concern. The underlying network

¹⁵ Such factors include, *inter alia*, available capital for expansion, a CLEC's need to establish priorities in allocating its available capital among numerous cities, the ease and cost of obtaining necessary rights of way, local franchises, etc.

¹⁶ See *U S West Petition* at 29.

that U S West uses to provide its high capacity services is the exact same network that it uses to provide monopolistic local exchange and exchange access services. Control over such facilities provides U S West with both the opportunity and incentive to engage in harmful cross subsidies.

One group that is sure to suffer from cross-subsidies are small interexchange carriers ("IXCs"). As CompTel has stated many times in the past, incumbent LECs offer two types of transport – direct-trunked and tandem-switched transport – over the same interoffice transport network.¹⁷ Small IXCs depend upon U S West's tandem-switched transport for a high percentage (in some cases 100%) of their traffic, while the largest IXCs can use direct-trunked transport for a substantial percentage of their traffic in Phoenix. In its petition, U S West is asking to have direct-trunked transport deregulated, implicitly conceding that it retains market power over tandem-switched transport. Were the Commission to grant U S West's request, U S West would have both the opportunity and incentive to use its captive tandem-switched customer base to cross-subsidize some or all of its direct-trunked transport offerings in Phoenix. This would result in even higher rates for tandem-switched transport users and an uneconomic access cost advantage for the largest IXCs who can benefit from U S West's direct-trunked transport offerings. Such cross-subsidies would undermine competitive conditions in the markets for interexchange and one-stop-shopping services and result in higher rates and fewer choices for consumers.

Other types of cross-subsidies are easy to imagine. For example, U S West desires forbearance relief to eliminate the prohibition against rate deaveraging for high capacity

¹⁷ See, e.g., *Expedited Petition for Reconsideration of Competitive Telecommunications Association; In re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72 at 18 (Filed July 11, 1997).

services within Arizona. Were the Commission to grant such relief, U S West could subsidize high capacity services in Phoenix, one of the major service areas in the state, with monopoly revenues from high capacity and other services in the rest of the state. Similarly, U S West could engage in other cross-subsidies within the Phoenix MSA. U S West concedes that there are significant geographic portions of the Phoenix MSA where facilities-based CLEC competition does not now exist. U S West could increase its rates for high capacity and other local services in those parts of Phoenix in order to subsidize high capacity services in areas served by facilities-based CLECS.

B. U S West Could Use This Opportunity to Circumvent Section 251(c) of the 1996 Act

Forbearance from dominant regulation also would give U S West an additional incentive not to comply with Section 251(c) of the 1996 Act. As the Commission is fully aware, U S West has refused to open its local monopoly to competition in compliance with Section 251 of the 1996 Act and the Commission's rules implementing that section. Deregulating U S West's high capacity services in Phoenix would only give U S West another reason to avoid complying with the market-opening provisions in the 1996 Act. If granting the petition would enable U S West to tap its existing market power over local services to subsidize high capacity services in Phoenix, then it would fight even harder to retain that local market power against competitive inroads by new entrants as contemplated by Section 251(c). The Commission should not be giving U S West an additional incentive to avoid complying with its statutory obligations. Forbearance from dominant regulation would in no way enhance competition and would only provide an additional mechanism for U S West to thwart competition in the local services market.

In filing its petition for forbearance, U S West's concern appears not to be that it has lost market power, which it obviously has not, but rather that it has lost some share of the retail high capacity market. However, even if U S West's statistics are correct and the competitive providers' market share increased near the end of 1997, this increase was not so significant as to warrant a reclassification of U S West's high capacity services. Forbearance from dominant carrier regulations cannot be brought about due to a mere decline in retail market share, but can be justified only based upon structural changes in the market that show the incumbent LEC to be on a competitive par with other competitors in the market. U S West has not made such a showing for the Phoenix market, and its petition must be rejected.

V. CONCLUSION

For the reasons stated herein, CompTel submits that the Commission should deny U S West's petition for forbearance from regulation as a dominant carrier in the Phoenix, Arizona MSA.

Respectfully submitted,

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Dated: October 7, 1998

CERTIFICATE OF SERVICE

This is to certify that I have on this 7th day of October 1998, served copies of the foregoing **OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION** upon all known parties of record, by depositing same in the United States Mail, addressed as follows:

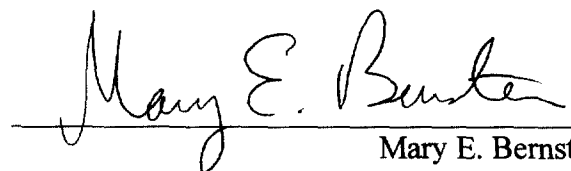
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